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No. 93-938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEX DANDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

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1. The Courts Below Ignored Liljeberg.

This Court has clearly laid down the standards governing judicial disqualification — a judge must disqualify himself whenever his participation in a case creates even the *appearance* of partiality or impropriety. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Neither the court of appeals nor the district court (and not even the government in its briefs below) mentioned *Liljeberg* in their discussion of the disqualification issue. The Solicitor

General's opposition glosses over this glaring omission, arguing that the legal standard applied by the court below was "consistent" with the standards enunciated in *Liljeberg* (Br. in Opp. 7). In fact, it was not.

Part of the family that owned the company that was the principal complaining witness on Count Eight lived across-the-street from the judge through the time that he completed law school. The president of the company was "known" to the judge for "close to twenty years" and contributed to the judge's political races for local prosecutor. These facts surely provided enough basis for the defense to be permitted to investigate these associations further. The judge, however, gave the defense *two* days within which to move for his disqualification (Pet. App. 49a-50a), and then denied the motion to disqualify.

The court of appeals paid lip service to the notion that the standard governing disqualification is "objective" (Pet. App. 8a), but the standard actually applied was subjective. According to Judge Cleland, his relationship with Douglas Mowat, the company president, was not an "intimate, personal relationship" nor was it one in which he would be "obligated" to Mowat (Pet. App. 8a). The court of appeals further emphasized that Mowat did not have a personal stake in the litigation "which might have influenced Judge Cleland" (Pet. App. 8a). And the court of appeals devoted nearly a full paragraph to considering whether London's Dairy, which was run by Mowat and owned by other longtime acquaintances of Judge Cleland, "*was considered by Judge Cleland* to be a victim" of petitioner's crime (Pet. App. 8a-9a; emphasis added). This analysis of the trial judge's subjective feelings about a government witness conflicts with the dictates of *Liljeberg*.

Moreover, the Solicitor General relegates to a footnote the court of appeals' statement that Judge Cleland did not judge Mowat's credibility since petitioner was tried by a jury (Pet. App. 8a). This fact was also relied upon by the district court in its order denying petitioner's motion for disqualification (Pet. App. 36a). This allocation of functions may bear upon actual prejudice, but *Liljeberg* requires disqualification even in cases where there is only the appearance of partiality. 486 U.S. at 860. The mere fact that the judge is not the initial decisionmaker does not avoid the appearance of partiality under *Liljeberg*, particularly when a judge is involved over an extended period of time with the principals of a company that appears to be the victim of the accused's offenses.

In short, the courts below not only failed to mention the *Liljeberg* standards, but they failed to apply them. Moreover, the petitioner was entitled to more time in which to investigate the relationship between Judge Cleland and the various principals of London's Farm Dairy. And on the known facts, the judge should have recused himself under 28 U.S.C. § 455(a).

2. The District Court's Sentence Creates an Appearance of Partiality.

The Solicitor General argues that the Judge's explanation for imposing the extraordinarily harsh 23-year sentence somehow tempers any appearance of partiality in the sentencing. The argument ignores the critical facts:

(a) Judge Cleland *himself* first raised the concern about his impartiality in the event of sentencing. At the May 14, 1991, hearing where he first disclosed his long-time association with Mowat and members of the London family,

the judge stated that "[t]he concern I would have from the defense side of this would be in the event of conviction and impending sentence" (Pet. App. 48a).

(b) Judge Cleland later denied petitioner's motion for disqualification on the plainly mistaken ground that any sentence would be subject to the "leveling and objectifying effect" of the Sentencing Guidelines (Pet. App. 37a).

(c) After petitioner's conviction, Judge Cleland discovered that the Sentencing Guidelines did not in fact apply, and, exercising the broad discretion that federal judges had before the effective date of the Sentencing Guidelines, he sentenced petitioner to a total of 23 years' imprisonment (J.A. 768-69).

Where, as here, the trial judge himself initially recognizes that questions might be raised as to his impartiality at the time of sentencing, and where his only expressed reason for rejecting those concerns at the time is his erroneous belief that the Sentencing Guidelines prevent any appearance of injustice, and where he ultimately imposes a sentence of 23 years' imprisonment when he discovers he is not constrained by the Guidelines, a reasonable person would surely raise an eyebrow. A correct application of this Court's *Liljeberg* decision would require disqualification because of the appearance of unfairness in the sentencing process.

3. The Court of Appeals Refused To Consider Petitioner's Claim That No Acts of Tax Evasion Occurred Within the Limitations Period.

The Solicitor General now surprisingly claims that the court of appeals considered on the merits petitioner's argument that there was insufficient evidence of acts of tax

evasion within the limitations period (Br. in Opp. 10). This is directly contrary to the position taken by the government in the court below and to the holding of the court of appeals.

In his original Rule 29 motion petitioner's trial counsel argued that Counts One and Two were barred by the statute of limitations because there was insufficient evidence that any acts of tax evasion had occurred within the limitations period (Pet. App. 53a-54a). The Solicitor General acknowledges that petitioner also claimed on appeal that the government failed to provide sufficient evidence of any acts of evasion within the statute of limitations period (Br. in Opp. 10).

The Solicitor General erroneously responds that the claim that there was no proof of "any affirmative acts of evasion within the statute of limitations" was rejected on its merits by the court of appeals. Only in *dictum*, according to the Solicitor General, did the court "suggest that petitioner failed to preserve any more general challenge to the sufficiency of the evidence" (Br. in Opp. 10-11). That is *not* what the court of appeals said it did. The court of appeals responded to petitioner's argument "that evidence of affirmative acts of evasion within the statutory period is insufficient to sustain his conviction on Counts 1 and 2" with a clear holding — "we decline to consider this issue" (Pet. App. 23a). How the Solicitor General can characterize this as a decision on the merits by the court below is a total mystery!

Indeed, the portions of the court of appeals' opinion that the Solicitor General cites to prove that the court below ruled "on the merits" of petitioner's claim that there was no proof of "affirmative acts of evasion within the statute of limitations" did not concern that issue at all. They concerned the question whether, *regardless of acts of evasion*, the statute

of limitations runs from the dates on which the tax returns were filed (Pet. App. 21a-22a).

4. The Waiver Rule Invoked by the Court of Appeals Is Untenable.

The Solicitor General makes a tortured effort to defend the holding of the court below that a defendant who asserts specific grounds for his Rule 29 motion waives all other grounds. The effort proves the error of the proposition.

In an attempt to reconcile the holding of the court of appeals with the clear rule of the Second Circuit that a motion under Rule 29 need not specify the particular grounds (*United States v. Gjurashaj*, 706 F.2d 395 (2d Cir. 1983)), the Solicitor General argues that although a defendant need not specify *any* grounds when he makes a Rule 29 motion, a specification results in the waiver of any ground not specified. In *Gjurashaj*, however, the defendant did provide specifics on some aspects of the government's failure of proof, but failed to make an argument with respect to one count. The Second Circuit firmly rejected the government's argument that, by making a specific argument, he had waived any claim that the evidence was insufficient with respect to other counts.

The perverse result of the Solicitor General's argument is that Rule 29 arguments would have to drag on for hours or days so that no potential factual issue is waived. Alternatively, a defense lawyer must be so general in his motion that it will be of no help to the trial judge. Courts have refused to require the specificity demanded by the Solicitor General's rule precisely to avoid this consequence.

CONCLUSION

Our petition for a writ of certiorari argues that both legal issues presented can be resolved summarily, without plenary briefing and argument. For the foregoing reasons, a writ of certiorari should be granted and the judgment of the court of appeals should be vacated.

Respectfully submitted,

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